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ABSTRACT

Discussed is the due process concept and rationale for parental input in educational decision-making, and indicated is the need for parental representation for children whose parents or guardians are unknown or unavailable or who are wards of the state. It is noted that provision of a "surrogate parent" was initiated by Public Law 93-380 and reinforced and broadened in Public Law 94-142. (IM)

Legal Background for the Surrogate Parent Program

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Decisions concerning educational placement have a profound effect on the lives of children, especially handicapped children. Historically, most of these decisions were made by professionals working in schools and parents were excluded. All too often these placements were based on expediency for schools rather than what was best for the child. Recently courts, legislatures, the Federal Government, etc. have intervened in this process on behalf of children. They have clearly upheld the child's right to due process before a change in educational placement is made. Further, the courts have reaffirmed the rights and responsibilities of parents to insure that due process protections are enforced.

There are however, children who lack parental representation. They are children whose parents or guardians are unknown or unavailable, or individuals who are wards of the state. The rights of these children cannot be protected unless an advocate acts for them. Recognizing this problem, Public Law 93-380 provides for the appointment of a "parent surrogate." This individual is appointed to safeguard a child's rights in the course of educational decision making including identification, evaluation and placement.

The origin of the due process concept can be traced to the fifth and fourteenth amendments to the U.S. Constitution. The fifth amendment specifies that no person shall "be deprived of life, liberty or due process of law." The fourteenth dictates that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law." Since educational decision making

does effect individual liberty, it is subject to due process protections. However, prior to the plethora of court cases and legislation in the seventies, decisions excluding children from school, placing them in special classes, or otherwise changing their educational placement were often made without regard for due process of law.

Due process, as interpreted by the Supreme Court, requires that before government can take adverse action against a citizen, it must provide him with notice of what is being done and an opportunity to contest the adverse action. Due process safeguards have been applied to mental patients and juvenile delinquents. More recently these safeguards have been extended to include children placed in special education classes for the educable mentally retarded. While initially due process was applied to retarded children, today the concept has broadened to include all handicapped children. Placement of handicapped children in segregated special education classes has been the focal point of recent court cases. Moreover, judicial decisions in these cases have been based on due process guarantees.

In Arreola v. Board of Education, a suit was filed on behalf of eleven Mexican-American school children. The plaintiff sought an injunction to prohibit the continuation of special education classes until a hearing was provided for parents before placements. Before the court rendered a decision in the Arreola case, filed in 1968, another case raising the same basic issue was filed in 1970. Diana v. Board of Education questioned the placement of Mexican-American children in classes for the retarded based on culturally biased testing. Further in Stuart v. Phillips, the question of placement was raised again. The plaintiffs in this

case were black and poor students placed in special classes for educable mentally retarded in Boston. The underlying issue in each of these cases was placement of children in segregated special classes. The courts found that placement in each of these cases was unconstitutional because due process protections were not observed. In Diana and Stuart the due process violation concerned culturally biased testing while in Arreola the violation was lack of parental involvement in the placement process.

In addition to the previously cited court cases two 1975 U.S. Supreme Court rulings affirmed the responsibility of American educators to follow due process procedures (Abeson, 1974). Further, major federal legislation (P.L. 93-380; P.L. 94-142) has affirmed the role of the parent in educational due process. State laws, in Connecticut (P.L. 75-255) and Massachusetts (Chapter 766), have also mandated the right of parental input into the placement process. Due process protections governing any alteration of a child's educational status have been considered the most significant element of the new legal principles emerging from the present turmoil (Abeson, 1974). Parental input in placement decisions is a central aspect of this educational due process (Abeson, Bolick, & Haas, 1975).

Horvath (1976), discussing the role of parents in educational placement, delineates three levels of input: no input in the placement process, input provided through request or suggestion and finally parental consent required for placement.

Historically the first level, or no input at all, has been the norm (Massaro, 1976). This viewpoint is based on the medical and psychiatric notion which holds that the professional knows what is best for the patient or client ("From diagnosis to

treatment", 1973).

The second level consists of parents actively suggesting what they deem appropriate service for their child to the education decision makers. For example California law states that parents are entitled to send an advisory person to the educationally handicapped child study team meeting (Kirp et.al., 1974).

The third level is essentially parent veto power over a placement plan. This is called "parental consent" required (Prillamen, 1975, Trudeau et.al., 1973).

Horvath (1976) has also discussed the rationale for parental input in educational decision making. The first rationale is described by Weintraub (1972) in citing State ex. rel. Kelley v. Ferguson. This 1914 ruling found that the American home is the prime factor in our scheme of government and, as long as the rights of other students are not injured, a parent may request one curriculum over another. Kakalik et.al. (1974) summed up parent responsibility as follows: "After all is said and done, the parent bears the ultimate responsibility for the handicapped child" (p. 61).

A second rationale was provided by Simches (1975) who noted that parents know a child best and therefore are able to supply anecdotes that may help in the placement process.

A third rationale is based on the trend away from standardized tests and the increasing use of information from other sources such as the home and community (Trudeau et.al., 1973).

A fourth rationale for parental involvement is the potential "watchdog" function that a parent may serve (Children out of school, 1974).

A fifth rationale would be that early parent involvement will foster a positive relationship between school and home. Parents will be active participants in the educational process rather than helpless or unwelcome intruders. Tracy et.al. (1974) alluded to this point in noting a relationship between "ownership feeling" and successful program implementation.

A final rationale for parental input in the placement process is one of developing "rights", especially consumer rights. The parent, an educational consumer, has traditionally bowed to the schools specialized knowledge (Barsch, 1969). The rights rationale was emphasized by Martin (1973) in quoting from the annual meeting of the President's Committee on Employment of the Handicapped in 1972 which stated "to enhance consumer participation in the rehabilitation process, clients should be read their 'rights' to rehabilitation, much as police read 'rights' to arrested offenders" (p. 9).

The previous discussion makes it clear that parents can and should play a vital role in educational decision making for their children. They must oversee the guarantee of educational due process for their children. There are however, children who lack parental representation. For example parents may be unknown (orphans), unavailable (children who are wards of the state) or uncooperative. This presents a serious problem for the child and requires creation of a new role if the child's due process rights are to be observed. To this end Public Law 93-380 developed a process for creating the role of a substitute or "surrogate parent" who would stand in for the child's real parents if they were either unknown or unavailable.

Abeson et.al. (1975) describes the rationale for development of the "surrogate parent" concept. "This concept is echoed in a second protective doctrine in American law which recognizes the legal disabilities imposed on a minor. This doctrine supplies a legal remedy in the form of a guardian of the person of the child. The guardian is vested with powers and duties to furnish the child responsible representation so that his personal rights can become functionally effective in his everyday life situations. Two major types of guardians are recognized by law: the natural guardian (the child's own parents or adoptive parents) and the legal guardian. Ideally, a guardian is appointed for a minor child whenever he is without proper guardianship from his parents. In this way a child's person and legal rights will be continuously in competent hands identified with his interests and welfare. A judicial process is used to provide a child with a legal guardian so that the exercise of authority and control by the legal guardian over the person and rights of the child will always be accountable at law (Weisman, 1973)" (p. 37).

Provision of a "surrogate parent" to ensure educational due process was initiated by Public Law 93-380. Recently this concept has been reinforced and broadened in Public Law 94-142. The essence of P.L. 93-380, "whenever parents or guardians of the child are not known, are unavailable, or if the child is a ward of the state, an individual must be assigned to act as a surrogate for the parents or guardian to protect the rights of the child," is repeated in P.L. 94-142. Moreover, funded agencies are specifically alluded to. Section 615 (b) (1) of P.L. 94-142 states that "agencies recieving funds under this act shall provide ...

(3) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the state, including assignment of an individual (who shall not be an employee of the state eudcational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian..." Noncompliance, by funded agencies, in this critical aspect of the Education for All Handicapped Children Act could result in federal withholding of funds. However, the major issue is one of rights not money. All children have a right to educational due process. Parents must demand and insist on observance of this process for their children. When parents are unknown or unavailable a child's rights are clearly in jeapordy. The "surrogate parent" concept is an attempt to alleviate this problem thereby ensuring educational due process for all children.

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